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In the Supreme Court of the United States

OCTOBER TERM, 1998

GRUPO MEXICANO DE DESARROLLO, S.A., *et al.*,
Petitioners,

v.

ALLIANCE BOND FUND, INC., *et al.*

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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REPLY BRIEF FOR PETITIONERS

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of the Rules of this Court, Petitioners' parent corporations and non-wholly owned subsidiaries are listed in the Rule 29.6 Statement in Petitioner's Brief ii.

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REPLY BRIEF FOR PETITIONERS

This case is about the proper bounds of a federal district court's power to issue a preliminary injunction to prevent a defendant from using its assets during the pendency of litigation. As petitioners argued in their opening brief, a preliminary injunction can issue to safeguard a potential judgment only when it restrains the same assets that are the subject of the plaintiff's underlying equitable claim. Even if this Court holds that a federal district court's injunctive powers are broader, no such preliminary injunction should issue when the district court is exercising its diversity jurisdiction and the injunction would be unavailable under state law.

In their opposition brief, respondents have sought to avoid these issues at every turn, lodging procedural objections to petitioners' arguments and attacking the nomen-

clature used by petitioners. They also claim now, for the first time and in contravention of the court of appeals' ruling and respondents' own apparent concession below, that the preliminary injunction issued by the district court is permissible under New York law.

In a further effort to cloud the legal issues before the Court, respondents cast aspersions on GMD's pre-injunction assignment of certain assets to pay *bona fide* creditors, even though many of these assignments were made in consideration for a substantial discounting of GMD's debt or were mandated by Mexican law. There was nothing nefarious about them. Respondents are similarly wrong when they assert that the court of appeals "recognized that GMD's dissipation of Government Notes was an attempt to frustrate the Investors' eventual judgment, rather than an effort legitimately to reduce GMD's debt and pay off creditors." Resp. Br. at 7-8. The court of appeals made no such finding, nor was it, as an appellate body, in any position to do so. Respondents descend further into the muck when they suggest that GMD misrepresented the quantity of Government Notes that it assigned to creditors (Resp. Br. at 4) and "filed a false affidavit." Resp. Br. at 33 n.15. As respondents well know, GMD, on its own initiative, updated its submissions to the district court as soon as additional information became available (and before any ruling by the district court). Pet. App. 5a-6a. Any incompleteness in GMD's initial submission was attributable directly to the need to respond hurriedly, with information gathered from abroad, to respondents' *ex parte* application for a preliminary injunction.

When respondents' superficial objections and factual misstatements are stripped away, respondents' position can be seen for what it is—a demand for a far-reaching judicial expansion of the power of the federal district courts to afford equitable relief, without historical predicate,

guidance from Congress, or deference to state law prohibitions.

I. THIS APPEAL IS NOT MOOT

Respondents seek to avoid the merits of this case by arguing that, because the district court eventually entered a permanent injunction, petitioner's challenge to the preliminary injunction "has been rendered moot." Resp. Br. at 12. But this argument already has been made to, and rejected by, the court of appeals, and this Court granted review in the face of respondents' protestations of mootness. The district court entered the permanent injunction *before* the court of appeals affirmed the district court's issuance of the preliminary injunction. The court of appeals expressly rejected respondents' Suggestion of Mootness. J.A. 118. Respondents also claimed mootness in their response to GMD's cert. petition (Br. in Opp. 4 n.3), and this Court nevertheless granted the petition.

More important, respondents' mootness argument rests on a misreading of this Court's decisions. *University of Texas v. Camenisch*, 451 U.S. 390 (1981), the case on which respondents principally rely, is not comparable to the present case. There, a deaf student alleged that the University of Texas was violating § 504 of the Rehabilitation Act of 1973 by refusing to provide him with a sign language interpreter. The student sought and obtained a preliminary injunction ordering the University to pay for an interpreter while his suit was pending. *Id.* at 392. The court of appeals affirmed. *Id.* at 393. By the time the court of appeals rendered its decision, the University had obeyed the injunction by paying for the interpreter and the student had graduated. *Id.* This Court held that the University's appeal of the preliminary injunction was moot because the preliminary injunction no longer was having any real-world consequences, and the issue of whether § 504 required the University to pay for the interpreter could be resolved in a trial on the merits. Unlike GMD

here, the University in *Camenisch* did not have an independent claim for damages arising from the wrongful issuance of the injunction. The University did not challenge the injunction on any ground other than that relating to the underlying merits of the lawsuit. As a result, the University could obtain complete relief from the effects of the preliminary injunction by pursuing the case to final judgment. An ultimate determination that the University could not be required, under the statute, to pay for the student's interpreter would have entitled the University to a refund of what it had already paid. After the student graduated, in other words, the University's claim that the preliminary injunction was wrongful became identical to its position on the merits. *Camenisch* did not concern the power of the district court to issue a preliminary injunction but rather the proper interpretation of § 504 and whether it required the University to pay for the interpreter.

In this case, by contrast, GMD's claim for damages is totally independent of the merits of respondents' underlying lawsuit. GMD never contested the likelihood that respondents would prevail on the merits. Rather, GMD challenged the district court's power to issue a preliminary injunction to restrain a defendant's use of assets in order to preserve a potential money judgment. If GMD prevails here, it will be able to pursue damages arising from GMD's forced inability to restructure its debts and other financial obligations during the pendency of the preliminary injunction. *See* GMD Br. at 6-7.

Respondents contend that damages sustained as the result of the wrongful issuance of a preliminary injunction are not compensable if a permanent injunction issues before an appeal of the preliminary injunction is adjudicated. Resp. Br. at 13. That position is supported by neither logic nor authority. The right to seek damages arising from a wrongful preliminary injunction cannot depend on the speed at which the case is adjudicated on

the merits. Nor can a plaintiff's eventual entitlement to a permanent injunction automatically cure real economic injury arising from erroneous interim relief or insulate such erroneous interim relief from appellate review.[1]

II. THE PRELIMINARY INJUNCTION AT ISSUE CONSTITUTES AN IMPERMISSIBLE EXPANSION OF THE DISTRICT COURTS' EQUITABLE POWERS

Notwithstanding all their rhetoric, respondents ultimately do not deny that an affirmance of the court of appeals would require this Court to sanction a broad-based expansion of the district courts' equitable powers beyond those that currently exist or were exercisable in the English Courts of Chancery. Respondents concede that the kind of preliminary injunctive relief ordered by the district court in this case has never been approved by this Court, and they fail to identify any historical predicate—either under United States or English law—for its issuance. Although respondents claim (without citing any supporting authority) that the English Courts of Chancery always possessed the power to issue such an injunction, even respondents concede that those courts never actually exercised that power until the Court of Appeal decision in *Mareva Compania Naviera, S.A. v. International Bulk Carriers, S.A.*, 1975 2 Lloyd's Rep. 509 (Eng. C.A.).

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[1] Respondents question petitioners' decision not to appeal the entry of the permanent injunction. Resp. Br. at 19-20. But the law that would have governed such an appeal is very different from the law that should have controlled respondents' preliminary injunction application. Under New York law, a judgment creditor *can* obtain a restraining notice preventing the judgment debtor from transferring or assigning any property until the judgment is satisfied. C.P.L.R. § 5222 (McKinney 1994). Respondents nowhere explain why GMD should have been required to appeal a permanent injunction expressly authorized by statute so as to preserve its rights with respect to a preliminary injunction that was clearly unauthorized under New York law.

Similarly, although respondents claim that the equitable powers of the federal courts must be "flexible" and "adaptable," all of the cases and commentaries on which respondents rely concern a flexible application of existing equitable powers to novel factual contexts. They do not advocate flexibility in expanding the scope of the equitable powers that can be exercised by the district courts. Respondents try to articulate the advantages of arming the district courts with *Mareva*-type injunctive power, but this sort of argument ignores the fundamental point that in this country the expansion of the district courts' power is not within the province of the judiciary. The Constitution delegates such authority exclusively to Congress.

A. The Preliminary Injunction Is Not Supported By This Court's Holdings

As respondents concede, neither *Deckert v. Independence Shares Corp.*, 311 U.S. 282 (1940), nor *United States v. First Nat'l City Bank*, 379 U.S. 378 (1965), authorizes the issuance of a preliminary injunction to preserve assets to satisfy a potential money judgment. Resp. Br. at 22. Respondents argue, however, that the decisions in those cases "support the district court's preliminary injunction in principle." *Id.* This is wishful thinking. In both *Deckert* and *First Nat'l*, the preliminary injunctions were issued to preserve the same assets that were the subject of the plaintiffs' underlying equitable claims. Here, by contrast, respondents asserted a garden-variety breach of contract claim seeking fungible money damages.

The primary issue in *Deckert* was whether a plaintiff could assert an equitable claim under the Securities Act of 1933. That question was significant because, if the plaintiffs were precluded from asserting an equitable claim, they would have been unable to obtain a preliminary injunction restraining the disposition of common stocks that allegedly had been purchased with the money they were fraudulently induced to pay. Respondents argue that the

fact that the plaintiffs in *Deckert* proceeded by "a bill in equity . . . formed no part of this Court's *ratio decidendi*." Resp. Br. at 23. To the contrary, the Court considered the propriety of the preliminary injunction only after holding that an equitable action could be brought under the Securities Act. The legitimacy of plaintiffs' assertion of an equitable claim was, in the Court's view, a prerequisite to the availability of injunctive relief, thus implying that the preliminary injunction in *Deckert* would have been unavailable if plaintiffs' only claims under the Securities Act had been legal claims for money damages.

In *First Nat'l*, the government brought an action to foreclose a tax lien—the government did not sue for money damages. Resp. Br. at 24.[2] Respondents are correct in their assertion that the "primary difference" between this case and *First Nat'l* is "that the government in *First National City Bank* sought to foreclose a lien while the plaintiffs in this case seek to collect a debt." Resp. Br. at 27. But the distinction is significant. In *First Nat'l*, the government, as a result of its lien, had an equitable claim over a specific asset belonging to the defendant and obtained an injunction pursuant to a provision of the tax code. Here, by contrast, respondents brought an action at law for breach of contract seeking money damages. For respondents to assume that this Court would have sanctioned the issuance of the preliminary injunctions in *Deckert* and *First Nat'l* in the absence of an underlying equitable claim is pure speculation; moreover, the Court's discussion of the nature of the claims in those cases would have been entirely superfluous if, as respondents contend, district courts *always* have the authority to enjoin the use

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[2] As the government recognizes, *First Nat'l* "involved a specific statutory grant of injunctive authority and the paramount public interest in tax collection, elements that are not present in this case." Gov. Br. at 29. Petitioners do not challenge the propriety of a district court's issuance of a preliminary injunction pursuant to some statutory grant of authority.

or disposition of *any* assets whenever the courts conclude that such interim relief would be a desirable means of ensuring the enforceability of a potential final judgment.

De Beers Consol. Mines, Ltd. v. United States, 325 U.S. 212 (1945), like *Deckert* and *First Nat'l*, involved a claim for equitable relief—a permanent injunction preventing future violations of the Sherman Act and the Wilson Tariff Act. The Court held that the district court's preliminary injunction, prohibiting defendants from selling, transferring, or disposing of any property in the United States, was improper because it "deals with a matter lying wholly outside the issues in the suit." *Id.* at 220. Respondents assert that "*De Beers* does not draw a distinction between assets that are directly related, on the one hand, or indirectly related, on the other hand." Resp. Br. at 29. This comment misses the point. The *De Beers* holding presupposes the assertion of an equitable claim by the plaintiff. The Court addressed the relationship between the subject of the preliminary injunction and the ultimate relief sought by the government only because the government had asserted an equitable claim. The Court's language makes clear that, if the government had not sought final equitable relief, preliminary injunctive relief would have been unavailable for that reason alone, without any further inquiry into the connection between the preliminary injunction and the ultimate relief sought. *See* GMD Br. at 12.

Respondents seek to limit the scope of *De Beers* by arguing that this Court reversed the grant of the preliminary injunction because "the defendants' bank accounts could 'in no circumstances' be the subject of the final judgment . . . ." Resp. Br. at 29 (citation omitted). They cling to the statement in *De Beers* that "[a] preliminary injunction is always appropriate to grant intermediate relief of the same character as that which may be granted finally." This statement, respondents contend,

supports their view that a preliminary injunction should be available whenever the "very assets" subject to the injunction are capable of satisfying the final judgment. Resp. Br. at 28, *quoting De Beers*, 325 U.S. at 220. Thus, under respondents' regime, whenever a plaintiff seeks money damages, a preliminary injunction should be available to restrain the defendant's use of any money or other assets that can be converted into money—*i.e.*, "relief of the same character as that which may be granted finally."

Respondents' analysis nullifies the concerns raised by this Court in *De Beers*. In describing the potential harm in extending the district courts' powers to permit the issuance of a preliminary injunction to secure compliance with a potential judgment, this Court stated "it is difficult to see why a plaintiff in any action for a personal judgment in tort or contract may not, also, apply to the chancellor for a so-called injunction sequestrating his opponent's assets pending recovery and satisfaction of a judgment in such a law action." *De Beers*, 325 U.S. at 222-23. Any action at law for tort or contract involving a claim for money damages is, logically, capable of satisfaction with any assets of the defendant, thus rendering those assets—in respondents' view—subject to a preliminary injunction. The *De Beers* Court thus treated as clearly improper exactly what respondents advocate—the use of injunctive relief to restrain a defendant's assets to satisfy a potential money judgment. In rejecting the preliminary injunction sought by the government in *De Beers*, the Court could have relied entirely on the attenuated connection between the requested interim relief and the ultimate relief sought in the action. The Court did not stop there, however. It explained its decision in part by observing that a ruling for the government in the circumstances of *De Beers* conceivably could be used as authority for a preliminary injunction of the kind at issue here, an outcome that the Court regarded as plainly inappropriate.

B. Equitable Relief In The Federal Courts Must Be Within The Traditional Scope Of Equity As It Existed In The English Courts Of Chancery

Contrary to respondents' contention, the equitable powers of the federal district courts are not broad, expansive, or unfettered. Resp. Br. at 33-34, 37. The cases and commentary cited by respondents merely advocate the flexible application of existing equitable powers to new factual circumstances. Resp. Br. at 31-34. Those cases, even as described by respondents, stand for the unremarkable principle that the decision whether to grant an injunction in a particular case is left to the "sound discretion" of the district courts. Resp. Br. at 31 n.14. They do not countenance any expansion of the district courts' equitable powers. Rather, the Judiciary Act of 1789 bestowed on the district courts only those equitable powers that were exercised by the Courts of Chancery.[3] *See* GMD Br. at 14-16.

Respondents suggest that the existence of equitable jurisdiction ends the inquiry. Resp. Br. at 33-34. It does

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[3] Respondents take issue with GMD's use of the phrase "inherent power" to describe the "equitable powers" of the federal courts. Resp. Br. at 32. Respondents' argument is misdirected. First, the phrases "inherent power" and "general equitable power" and "inherent equitable power" frequently have been used interchangeably by the courts. *See, e.g., De Beers*, 325 U.S. at 221 ("inherent power"); *Rosen v. Cascade Int'l, Inc.*, 21 F.3d 1520, 1526 (11th Cir. 1994) ("general equitable authority"); *In re Fredeman Litig.*, 843 F.2d 821, 824 (5th Cir. 1988) ("inherent equitable power"); *ITT Community Dev. Corp. v. Barton*, 569 F.2d 1351, 1360 (5th Cir. 1978) ("inherent power"). More fundamentally, however, even if the distinction advocated by respondents is a real one, it does not aid respondents' position. The equitable authority conferred by Congress, no less than the inherent power exercised by the federal courts in controlling their dockets and the proceedings before them, is limited. In the case of the courts' equitable power, that limitation is provided by the limits that governed the English Courts of Chancery at the time that Congress used them as a model for the power to be conferred on the federal courts.

not. As this Court held in *Stainback v. Mo Hock Ke Lok Po*, 336 U.S. 368, 382 n.26 (1949), cited by respondents,

> Notwithstanding the fusion of law and equity by the Rules of Civil Procedure, the substantive principles of Courts of Chancery remain unaffected. . . . The "jurisdiction" thus conferred on the federal courts to entertain suits in equity is an authority to administer in equity suits the principles of the system of judicial remedies which had been devised and was being administered by the English Court of Chancery at the time of the separation of the two countries. . . .

This Court's decision in *Gordon v. Washington*, 295 U.S. 30 (1935), also relied on by respondents, demonstrates the Court's unwillingness to expand the district courts' equitable powers beyond those that existed in the Courts of Chancery. In *Gordon*, the Pennsylvania Secretary of Banking took possession of the assets of a financially unstable trust institution and obtained the status of a general receiver pursuant to the Pennsylvania Banking Act. *Id* at 32. Owners of participation certificates in mortgages held by the trust filed complaints in federal district court claiming that they had not received scheduled interest payments. *Id.* at 33. Plaintiffs moved successfully for the appointment of another receiver to administer the mortgage pools. *Id.* at 34. The Banking Secretary moved to dismiss the complaint and challenged the authority of the district court to appoint a receiver. *Id.* The district court denied the motion, and the court of appeals affirmed. *Id.* at 35.

This Court determined that the district court had jurisdiction over the cause and power to act as a court of equity. These findings did not end the inquiry, however. Rather, the Court held that the district court also should have determined "whether, in accordance with the accepted principles of equity, any state of facts was presented to it which called for the exercise of its extraordinary powers as a court of equity." *Gordon*, 295 U.S. at 36. The

Court reversed, holding that a district court may appoint a receiver to preserve and protect property pending its final disposition by the court. A court of equity cannot, however, "appoint a receiver of property of which it is asked to make no further disposition." *Id.* at 37. The reason for the limitation was that "[t]he English Chancery Court from the beginning declined to exercise its jurisdiction for that purpose." *Id.* Similarly, in this case, the district court, although possessing equitable jurisdiction, was not thereby empowered to grant preliminary injunctive relief freezing defendants' assets in aid of a potential money judgment.

C. The Preliminary Injunction Issued By The District Court Was Unavailable In The English Courts Of Chancery

Notwithstanding respondents' suggestion to the contrary (Resp. Br. at 35), the decision of the English Court of Appeal in *Mareva* marked a departure from the Chancery Court's longstanding refusal to issue a preliminary injunction to protect a potential creditor before he obtains a judgment. This country's equity jurisprudence has been characterized by the same prohibition. *See Hollins v. Brierfield Coal & Iron Co.*, 150 U.S. 371 (1893) (holding that a simple contract creditor whose claims have not been reduced to judgment, and who has no express lien by mortgage, trust deed, or otherwise, cannot obtain seizure of the property of the debtor in a federal court of equity); *Scott v. Neely*, 140 U.S. 106 (1891) (holding that court of equity may not aid the enforcement of a debt unless creditor obtained judgment and attempted to execute on the judgment).

In *Mareva*, the Court of Appeal recognized that the issuance of an injunction to restrain a defendant's use of assets and thereby to preserve a potential money judgment would be permissible only upon a reconsideration of the court's prior decision in *Lister & Co. v. Stubbs*, 1890 45

Ch.D. 1 (Eng. C.A.).[4] In fact, in *Nippon Yusen Kaisha v. Karageorgis*, 1975 2 Lloyd's Rep. 137 (Eng. C.A.), decided only one month before *Mareva*, the Court of Appeal ruled that "it has never been the practice of English courts to seize assets of a defendant in advance of judgment, or to restrain the disposal of them." *See also Siskina Cargo Owners v. Distos Compania Naviera, S.A.*, AC 210 HL (1979).

This Court need not (and should not) decide whether, as a matter of public policy, the federal district courts should be armed with *Mareva*-type injunctive power. Rather, only Congress can legislate an expansion of the district courts' powers. *See, e.g., Snyder v. Harris*, 394 U.S. 332 (1969). In fact, Congress has enacted legislation expanding the district courts' injunctive powers in various circumstances.[5] *See, e.g.*, Food, Drug and Cosmetics Act, 21 U.S.C. § 332 (1938); Petroleum Marketing Practices Act, 15 U.S.C. § 2805 (1978); Labor Man-

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[4] Respondents state that "[t]ellingly, Lister & Co., which was the plaintiff in that case, did not even allege that its former employee who was the defendant, was dissipating assets or was insolvent and would be unable to satisfy a money judgment if the company prevailed on its claim." Resp. Br. at 34 n.17. The court in *Lister* did not, however, deny Lister's request for an injunction because its allegations were somehow inadequate. To the contrary, if the decision in *Lister* had been predicated merely on defective pleading, that case would not have been a stumbling block for the court in *Mareva*.

[5] Respondents argue that GMD's theory would "call into question the availability of injunctions outside commercial law, in cases to redress violations of civil rights, unfair competition, trademark infringement, trade secret misappropriation, and other substantive law." Resp. Br. at 37. Nothing could be further from the truth. GMD does not challenge the availability of preliminary injunctive relief in equitable actions. Nor does GMD challenge Congress' power to legislate an expansion of the district courts' power to issue preliminary injunctive relief. Congress has not, however, enacted a *Mareva*-type statute. Until it does, the district courts should not be permitted to expand unilaterally the scope of their equitable powers.

agement Relations Act of 1947, 29 U.S.C. § 178 (1947); Fair Labor Standards Act, 29 U.S.C. § 217 (1961). The issue in this case is the extent of the powers that federal courts have been given, not what powers they ought to be given.

Even if the issue were only what is desirable, however, the answer would be far from clear. The government identifies several "functional reasons" why the district courts should be empowered "to issue preliminary injunctions under circumstances like those in this case." Gov. Br. at 19-20. But those reasons must be weighed against the serious and wide-ranging implications that such injunctive power would have in the area of creditors' rights. In ordinary business dealings, a company, even an insolvent one, is free to pay any of its *bona fide* creditors to the exclusion of others until it seeks (or is forced to seek) the protection of the Bankruptcy Code. *See* Thomas H. Jackson, *The Logic and Limits of Bankruptcy Law* 124 (1986). The *Mareva*-type injunctive power exercised by the district court (and advocated by respondents and the government) encourages a "race to the courthouse" that the Bankruptcy Code is designed to discourage. *See, e.g., Martin-Trigona v. Champion Fed. Sav. & Loan Ass'n*, 892 F.2d 575, 577 (7th Cir. 1989) (observing that one purpose of the Bankruptcy Code is "to prevent creditors from trying to steal a march on each other").

Affirmance of the decision below inevitably will spawn preliminary injunction motions in a large percentage of civil damage actions in the federal courts. In any case involving a financially unstable or foreign defendant, or in which the plaintiff believes it has some reason to doubt the collectibility of a potential judgment, the plaintiff will be inclined to seek an "*Alliance* injunction" to ensure that assets are available to satisfy his claim, without regard to the claims of other creditors. A defendant subject to

such an injunction may be frustrated in its ability to operate as a going concern and, ultimately, may be forced to seek the protection of the Bankruptcy Code.[6] Indeed, in such circumstances, the allegations of financial uncertainty or distress that a plaintiff would use as a basis for a preliminary injunction might well become a self-fulfilling prophecy, if the requested interim relief were granted. Such dramatic changes to the balance of power between debtors and creditors should not be implemented without the imprimatur of Congress.

III. A FEDERAL DISTRICT COURT SITTING IN DIVERSITY SHOULD NOT BE PERMITTED TO ISSUE A PRELIMINARY INJUNCTION WHEN SUCH RELIEF WOULD BE UNAVAILABLE UNDER STATE LAW

A. Petitioners' Reliance On *Erie v. Tompkins* Is Proper

Respondents argue that the "*Erie* issue" was "not fairly included in the question on which the Court granted review" and was "neither pressed nor passed on by any court below." Resp. Br. at 42, 43. The question whether the federal district court in this case—which is and always has been a diversity action, according to respondents' own allegations—had the authority to issue a preliminary injunction under the circumstances presented here was the very question presented in GMD's petition for a writ of certiorari and the very question ruled on by the court of appeals.

At all times, GMD has challenged the power of the federal district courts to issue a preliminary injunction that prohibits a defendant from using its assets and thus seeks to preserve funds for the purpose of satisfying a

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[6] The deleterious effects of such an injunction would be particularly severe if, as respondents contend, any damages suffered during the pendency of the wrongful injunction are not compensable should the plaintiff eventually prevail on the merits. Resp. Br. at 20.

potential money judgment.[7] In its opening brief on the merits, GMD argued, first, that the federal courts generally lack such power and, second, that at minimum federal courts lack such power when they are sitting in diversity in a state whose courts are not authorized to grant such interim relief. The second argument is a subset of the first and is therefore included within the question presented for review. *See* this Court's Rule 14.1(a); *see also* this Court's Rule 24.1 (in a brief on the merits, "[t]he phrasing of the questions presented need not be identical with that in the petition for a writ of certiorari"). There is no question that this is a diversity case or that *Erie* is applicable. Nor is there any question that the court of appeals considered whether the preliminary injunction could issue under New York law. The court of appeals expressly held that it could not. Pet. App. 8a. What respondents term the "*Erie* issue" is merely a part of the argument that GMD has pressed from the inception of

[7] GMD argued in its Memorandum of Law in Opposition to Plaintiffs' Application for a Preliminary Injuncton that:

> this Court does not have the power under Rules 64 and 65 of the Federal Rules of Civil Procedure to grant an injunction freezing defendants' assets that are unrelated to the underlying litigation.

The question presented in GMD's brief to the court of appeals was:

> [d]id the District Court exceed its authority by issuing a preliminary injunction prohibiting the Defendants from using assets which are unrelated to the pending litigation and are held outside of the court's jurisdiction for the purpose of securing an eventual judgment that may be obtained by Plaintiffs?

The question presented in GMD's Petition for Writ of Certiorari was:

> [i]s a United States District Court empowered to issue a preliminary injunction prohibiting a defendant from transferring or assigning assets unrelated to the plaintiff's underlying claim and held outside of the court's jurisdiction in order to ensure that funds will be available to satisfy a potential money judgment?

this lawsuit, namely, that the district court was not authorized to enter the relief sought by respondents.

B. New York Law Does Not Authorize The Preliminary Injunction Issued By The District Court

Respondents now contend for the first time that the preliminary injunction issued by the district court was permissible under New York law. The court of appeals held otherwise. Pet. App. 8a ("[u]nder New York law, 'a preliminary injunction is . . . unavailable in an action for a sum of money only' ").[9] Neither in the district court nor in the court of appeals did respondents challenge GMD's claim that the preliminary injunction was unavailable under New York law. In fact, the court of appeals observed that "[a]ll parties acknowledge that Judge Martin could not have enjoined the use of the Toll Road Notes under Rule 64 (and New York's injunction statute) because the Investors sought only monetary damages." *Id.* All of the cases cited by respondents here involve circumstances in which (a) the subject of the preliminary injunction was the same *res* or "thing" as was the subject of the plaintiff's underlying claim (*see Zonghetti v. Jeromack*, 541 N.Y.S.2d 235 (App. Div. 2d Dep't 1989) (preliminary injunction issued to restrain defendant's sale of assets purchased with funds converted from plaintiff); *Ma v. Lien*, 604 N.Y.S.2d 84 (App. Div. 1st Dep't 1986) (preliminary injunction issued to escrow proceeds of disputed lottery ticket); *Pando v. Fernandez*, 508 N.Y.S.2d 8 (App. Div. 1st Dep't 1986) (same); *R. Prescott & Son, Inc. v. Nye*, 228 N.Y.S. 156 (App. Div. 3d Dep't 1928) (preliminary injunction issued to prevent insurance company from

[9] This Court ordinarily accepts the interpretation of local law by the court of appeals. *See, e.g., Byrd v. Blue Ridge Rural Elec. Coop., Inc.*, 356 U.S. 525, 529-30 (1958). This is especially true where, as here, the author of the opinion is a renowned commentator on the state law at issue. *See Ragan v. Merchants Transfer & Warehouse Co.*, 337 U.S. 530, 534 (1949); McLaughlin, J., Practice Commentaries, 7B McKinney's C6301:1 at 209 (1980).

paying insurance funds in action to foreclose a lien on the funds); *Air Traffic Conference v. Downtown Travel Ctr., Inc.*, 383 N.Y.S.2d 805 (Sup. Ct. N.Y. Co. 1976) (preliminary injunction issued to restrain defendant from dissipating funds held in trust for plaintiff); *Rolnick v. Rolnick*, 230 N.Y.S.2d 789 (Sup. Ct. Queens Co. 1962) (preliminary injunction issued to prevent defendant from transferring stock subject to action to impose constructive trust)), or (b) the preliminary injunction was issued pursuant to some statutory provision other than C.P.L.R. § 6301. *See H.I.G. Capital Management, Inc. v. Ligator*, 650 N.Y.S.2d 124 (App. Div. 1st Dep't 1996) (preliminary injunction issued pursuant to C.P.L.R. § 7502(c)).

C. Fed. R. Civ. P. 65 Does Not Authorize The Issuance Of The Preliminary Injunction

Respondents contend, without any supporting case law, that "Rule 65 authorized the preliminary injunction entered by the district court below" and, accordingly, *Erie* is not implicated. Resp. Br. at 46. The court of appeals did not, however, predicate its affirmance of the district court's order on Rule 65 but rather relied on the court's "general equitable power." Pet. App. 12a. The court of appeals held, and GMD agrees, that "Federal Rule of Civil Procedure 65 establishes the procedure for securing preliminary injunctive relief in civil actions." *Id.* at 7a. Even the cases cited by respondents recognize that "Rule 65 does not provide explicit guidance as to the factors to be considered when making a preliminary injunction decision." *Southern Milk Sales, Inc. v. Martin*, 924 F.2d 98, 102 (6th Cir. 1991). Accordingly, the question is whether, under *Erie*, the "general equitable powers" of the federal district courts should trump a conflicting state law. They should not.

D. The Federal District Courts Should Not Be Permitted To Apply Federal Judge-Made Law In Contravention Of New York State Law

Respondents argue that the general equitable powers of the federal district courts should supersede conflicting state law because "[p]reliminary injunctions are a provisional remedy and do not determine the ultimate outcome of litigation."[10] Resp. Br. at 47. Respondents fail, however, to cite a single decision of this Court in which federal judge-made law was held to trump conflicting state law in a diversity case. To the contrary, this Court has held that the question of " '[w]hether latent federal power should be exercised to displace state law is primarily a decision for Congress,' not the federal courts." *See Atherton v. Federal Deposit Ins. Corp.*, 519 U.S. 213, 219 (1997), *quoting Wallis v. Pan Am Petroleum Corp.*, 384 U.S. 63, 68 (1966).

This Court's *Erie* jurisprudence mandates that a conflict between federal judge-made law and state law be resolved with reference to the twin aims of *Erie*—discouraging forum shopping and promoting the equitable administration of the laws. *See* GMD Brief at 24, 28. Respondents seek to counterbalance these goals with the "federal interest in having uniform equitable remedies and entering effectual judgments." Resp. Br. at 11. But *Erie* permits no such balancing. The whole point of *Erie* and

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[10] Respondents cite a number of cases in support of their claim that "lower federal courts agree that the decision whether to issue a preliminary injunction is one of procedure." Resp. Br. at 47 n.27. An equal abundance of authority disagrees. *See, e.g., Sims Snowboards, Inc. v. Kelly*, 863 F.2d 643, 647 (9th Cir. 1988); *Franke v. Wiltschek*, 209 F.2d 493, 496-97 (2d Cir. 1953); *Kaiser Trading Co. v. Associated Metals & Minerals Corp.*, 321 F. Supp. 923, 931 n.14 (N.D. Cal. 1970) (availability of preliminary injunction, because of substantive importance, determined by state law); 13 James Wm. Moore et al., Moore's Federal Practice § 65.07 (3d ed. 1998).

its progeny is that, in our federal system, the goal of maintaining uniformity of law within a state must take precedence over the uniform application of law in the federal district courts.

In *Guaranty Trust Co. v. York*, 326 U.S. 99, 103 (1945), this Court recognized that *Erie* rejected the "attractive vision of a uniform body of federal law" embodied in *Swift v. Tyson*, 16 Pet. (41 U.S.) 1 (1842). Respondents once again seek to entice the Court with that vision. *Erie*, however, stands for the proposition that "[t]he operation of a double system of conflicting laws in the same State is plainly hostile to the reign of law." *Id.* at 112. This Court should reject respondents' invitation to make preliminary injunctive relief available in a diversity action in federal district court in New York in circumstances in which the same relief could not be rendered by a state court judge in the same jurisdiction.

CONCLUSION

For all the foregoing reasons, and those in petitioner's opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted,

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